

FAIR EMPLOYMENT & HOUSING COMMISSION

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MINUTES 475th COMMISSION MEETING

December 9, 2008
Held Telephonically in
Los Angeles, San Diego, Palo Alto, Sacramento
and San Francisco, California

PRESENT:

Los Angeles: Chairman George Woolverton.
San Diego: Commissioners Dave Carothers and Patricia Perez and ELAS Ann Noel.
Sacramento: Commissioner Linda Ng and DFEH Chief Counsel Tim Muscat.
Palo Alto: Commissioner Carol Freeman.
San Francisco: Commission staff Caroline Hunt, Joseph Ragazzo, and Loc D. Tra
and Deputy Attorney General Nancy Beninati.

OPEN SESSION

Chairman Woolverton moved, Commissioner Ng seconded, and the Commission unanimously voted to call the meeting to order at 10:00 a.m. [08-28]

REVIEW OF AGENDA

The Commission accepted the Agenda as submitted.

REVIEW OF THE MINUTES

Chairman Woolverton moved, Commissioner Freeman seconded, and the Commission unanimously voted to adopt the Minutes and Transactions of the 474th Commission meeting as submitted. [08-29]

Chairman Woolverton moved, Commissioner Ng seconded and the Commission unanimously voted to end Open Session and entered Closed Session. [08-30]

CLOSED SESSION

Only the Commissioners, Commission staff, and Attorney General staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

Writs and Appeals

ELAS Noel reported on the updated status of the following cases.

- (1) DFEH v. San Francisco BART (Bartley)

Oral argument was heard on December 3, 2008. The Court of Appeal will issue a decision in the next few months.

- (2) DFEH v. Sasco Electric (Scherl)

The first brief was filed by Sasco Electric on December 5, 2008. The final brief is due to be filed February 23, 2009.

Post Decision

ELAS Noel reported that DFEH is seeking to enforce judgments in the following cases and will provide more information to the Commissioners at the next Commission meeting.

- (1) DFEH v. CATERON, et al (Benjamin)
- (2) DFEH v. Capitol Hills AM/PM (Johnson)
- (3) DFEH v. San Diego City Event (Handevitd)
- (4) DFEH v. Harry Mayo (Young)
- (5) DFEH v. Fulkerson (Hartunian)
- (6) DFEH v. Gonzales (Banks/Project Sentinel)
- (7) DFEH v. Team One Stop (Reed)
- (8) DFEH v. Maureen O'Neill Family Trust (Lemons/Williams)

Administrative Adjudication: *Pending Decisions, Hearings Completed*

At 10:10 a.m., ALJ Hunt left the room and ALJ Ragazzo presented the following case.

- (1) DFEH v. Terra Linda Farms (Santillian/Rivas)

Commissioner Carothers moved, Commissioner Ng seconded, and the Commission voted 5:0 to adopt the proposed decision. [08-31]

Chairman Woolverton moved, Commissioner Perez seconded, and the Commission

voted 4:1 to make the proposed decision precedential. Commissioner Carothers dissented. [08-32]

ELAS Noel stated that the DFEH has asked the Commission to include a summary paragraph in the decision similar to that of appellate courts. The Commissioners agreed to provide such summaries in all FEHC decisions.

At 10: 56 a.m. ALJ Ragazzo left the room. ALJ Hunt rejoined the meeting and presented the following case.

(2) DFEH v. Jennifer Victoria (Project Sentinel)

Chairman Woolverton moved, Commissioner Carothers seconded, and the Commission voted 5:0 to adopt the proposed decision. [08-33]

Chairman Woolverton moved, Commissioner Ng seconded and the Commission unanimously voted to end Closed Session and entered Open Session. [08-34]

At 11:20 a.m. DFEH Chief Counsel Tim Muscat joined the meeting at the Sacramento location and introduced himself to the Commissioners and all participants.

OPEN SESSION

REGULATIONS

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and housing.

Pregnancy Regulations: At the previous Commission meeting on September 16, 2008, Commission staff had submitted the Commission's "Fiscal Impact Statement" to the Department of Finance for its approval. Staff is still awaiting the approval. Once it is received, staff will immediately submit the Commission's rulemaking package to the Office of Administrative Law and schedule public hearings about the Commission's regulations. Commissioner Freeman is working with Commission staff on this project.

Disability Regulations: Commission staff is preparing its disability regulations to be ready for rulemaking once it has launched its pregnancy regulations. Commissioner Freeman is also working with FEHC staff on this project.

Housing Regulations: Commission staff has made steady progress on new Commission housing regulations, holding monthly meetings with the Commission's Housing Working Group to discuss issues and to review draft language. The draft regulations are now 56 pages. The group has decided to meet every other Friday to speed the pace of completing these regulations. The next meeting will be December 19, 2008 from 10 a.m. to noon at the Commission's offices in San Francisco, with the option to participate telephonically. Commissioner Ng has agreed to work with FEHC staff on this project.

The Commission took a five minute recess at 11:10 a.m.

LEGISLATION

ALJ Ragazzo reported on legislative bills that would amend or impact the Fair Employment and Housing Act (FEHA), change or modify other civil rights laws, or be of interest to the Commission. ALJ Ragazzo discussed the status of AB 2874 (Ralph Act Damages) and SB 1608 (Disabled Persons: Equal Access Rights: Civil Actions).

AB 2874 would have allowed the Commission to award full compensatory damages to hate crime victims to the extent that they are properly warranted. Specifically, AB 2874 would have removed the \$150,000 damages cap for Ralph Act Violations. Although AB 2874 passed the Senate and Assembly, it was vetoed by Governor Schwarzenegger.

SB 1608 requires an attorney, when serving a demand letter or a complaint on a defendant for denial of access to a public accommodation or a complaint, to include a written advisory disclosing a defendant's right to request a stay and an early evaluation conference. The bill further imposes educational requirements on architects and contractors, and creates a new California Commission on Disability Access to consider comprehensive access policies, and to conduct studies and make reports to the Legislature. SB 1608 passed the Senate and Assembly and was approved by the Governor.

COMMISSIONERS' REPORTS

The Commissioners had nothing to report.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT

ELAS Noel discussed the following items from her report.

Commissioners Appointments: The Commission has three newly appointed Commissioners, Dave Carothers, Patricia Perez, and Stuart Leviton. Commissioner Stuart Leviton was unable to participate due to a previously scheduled engagement. Vice-Chair Tamiza Hockenhull was not reappointed to the Commission, and is no longer a member of the Commission as of November 18, 2008.

2008-09 & 2009-10 Budgets: FEHC's budgets for both this and next fiscal year are very constrained. Staff is doing everything possible to save money. Relocation for cheaper rent and layoffs are a possibility.

Adjudication and Settlement Conferences: Since January 2008 to date, the Department has issued 70 accusations. The Commission's ALJs handled 10 proceedings from September 6, 2008 through November 20, 2008. Due to a lack of a state budget earlier in the fiscal year, many hearings in July through September were postponed but have now been set for December, January and February.

State Bar Real Property Subcommittee on Fair Housing: The Commission is

working with the DFEH on Director Phyllis Cheng's initiative to organize a new Subsection of the State Bar to focus on fair housing issues, under the umbrella of the State Bar's Real Property Section. Staff hopes that this new Subsection will provide a professional home at the Bar to train attorneys for the fair housing/public accommodations practice and to grow the profession in this area. Director Cheng and ELAS Noel invited a cross section of fair housing advocates representing both plaintiffs and defense to organize the Subsection. The first meeting was held on December 3, 2008, at the State Bar's offices in San Francisco. At that meeting, the group selected co-chairs to head the Subsection and planned upcoming activities. ELAS Noel and Director Cheng suggested that the Subsection participate in housing-related activities in 2009.

Commission Meeting Dates for 2009: The Commission set tentative dates for FEHC meetings in 2009: February 11, April 14, June 16, August 18, October 20, and December 8, 2009. Due to a previous engagement, Commissioner Ng will not be participating at the February 11, 2009, meeting.

Ethics and Open Meeting Act Training: ELAS Noel reminded the Commissioners that the state's online ethics training is required once every two years and the course, which takes about two hours to complete, is being offered on the state's Department of Justice's website, <http://ag.ca.gov/ethics>.

ELAS Noel deferred the following item to ALJ Hunt.

Training, Outreach and Public Speaking: ALJ Hunt reported that on September 25, 2008, former Vice-Chair Hockenhull and Commission staff, ELAS Noel and ALJs Hunt and Ragazzo, presented a training seminar for DFEH and defense counsel on "Litigation Before the Fair Employment and Housing Commission," co-sponsored by the Alameda County Bar Association. ALJ Hunt organized the well received event. The seminar's topics ranged from "Strategies in Framing Your Case," to "Winning Techniques at Hearing."

ALJ Hunt also participated in a November 13, 2008 webinar on "Sexual Harassment 28 Years Later: Employers' Expensive Mistakes and How to Avoid Them" presented by Anderson-Davis, Inc. Also participating were a Human Resources representative and attorneys representing plaintiffs and defendants.

ELAS Noel reported that she will be participating in the January 31, 2009, Rutter Group program on updating employment law co-sponsored by the California Judges' Association in San Diego. This program is free of charge to the Commission.

Staffing: Manisha Daryani, a Hastings law student, is currently working with the Commission part-time as a Commission extern.

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S REPORT

DFEH Chief Counsel Tim Muscat shared three litigation trends with the Commission about Department's litigation before the Commission.

Cases before the FEHC: The Department is bringing more cases before the

Commission. Fiscal year 2007-08, the Department filed 80 accusations before the Commission. As of December 8, for fiscal year 2008-09, the Department has filed 51 accusations and by this fiscal year's end, the Department will have filed 115. Not only is DFEH going back to its historical norm, it is exceeding it. Chief Counsel Muscat is anticipating that DFEH will continue to file annually 115 to 120 accusations onward.

Mediation: DFEH is planning to ask the Commission to do more mediations of its cases, particularly in cases where exchanged offers are reasonable which may encourage both parties to settle or in cases where complainants have unrealistic expectations. In the latter instance, mediation is very helpful in that it acts as a reality check. This trend will continue in the foreseeable future. Chief Counsel Muscat commended ELAS Noel for doing a super job in a recent mediation and that all her efforts are greatly appreciated by the Department.

Opt-out Rate: The Department currently has about 50% of its cases opt-out to civil court. The statistic is higher in Southern California. However, this does not affect the results of the Department's opt-out cases. For example, a housing case in Southern California settled for \$618,000 and a housing case in Sacramento settled for \$70,000. This being said, these opt-out cases prove to be very time-consuming and expensive. Muscat felt that in terms of efficiency, the Department's small to medium-sized cases are better prosecuted before the Commission.

Muscat urged the Commission to continue with its outreach effort to show that the FEHC is an effective and efficient forum for these cases.

Muscat thanked the Commission for conducting the recent staff counsel training. The feedback was super and the Department legal staff learned a lot.

ATTORNEY GENERAL'S REPORT

Deputy Attorney General (DAG) Nancy Beninati reported on the work of the Civil Rights Enforcement Section (CRES) of the Attorney General's (AG) Office. She discussed the following matters.

From its investigations, the AG's Office has found that the Los Angeles International Airport's (LAX) shuttle buses were inaccessible to people with disabilities because the buses do not have kneeling or lift devices. As a settlement, LAX has agreed to install these devices on their shuttle buses by 2010 and to pay \$73,000 in restitution to the AG's Office. Part of this money will go toward the costs of future monitoring to ensure that LAX's buses are in compliance with the Americans with Disabilities Act (ADA), the Fair Employment and Housing Act (FEHA), and the Unruh Act.

On September 23, 2008, DAG Michael Newman filed a lawsuit against Minh Development and Management in Los Angeles Superior Court. The lawsuit alleges that Minh Development and Management engaged in housing discrimination against Latino and African American tenants while favoring Asian tenants. The AG, with help from the Housing Rights Center, has found that Minh Development and Management only advertised in Asian languages, made the units available for viewing only to Asians, and quoted different availability and rental rates to

perspective tenants based on ethnicity and national origin.

The United States Department of Health and Human Services (HHS) has decided to implement regulations to excuse medical staff with religious, moral or ethical objections from participating in medical procedures including abortion or contraceptive services. These amendments include the Church Amendments, Public Health Services Act, and the Weldon Act. The Attorney General has written a letter to the HHS urging them not to adopt these amendments because they are overbroad and provide no provisions for emergency care with regard to the health of a woman. Furthermore, these amendments might also violate the employer's ability not to hire a person for a particular task if they choose not to perform this task.

Chairman Woolverton explained to the new Commissioners the AG's functions and working relationship with regard to the Commission.

PUBLIC COMMENTS

There were no other public comments.

Chairman Woolverton moved, Commissioner Ng seconded, and the Commission unanimously voted to adjourn the meeting. [08-35]

ADJOURNMENT

The Commission adjourned its meeting at 11:50 a.m.

Date: December 9, 2008

GEORGE WOOLVERTON
Chairman

ANN M. NOEL
Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS
OF THE 475th COMMISSION MEETING**

December 9, 2008

Held Telephonically in

**Los Angeles, San Diego, Sacramento, Palo Alto
and San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 08-28 Unanimously called the meeting to order.
- 08-29 Adopted the Minutes and Transactions of the 474th Commission meeting.
- 08-30 Voted 5:0 to end Open Session and entered Closed Session.
- 08-31 Voted 5:0 to adopt the proposed decision in DFEH v. Terra Linda Farms
(Santillian/Rivas)
- 08-32 Voted 4:1 to make the proposed decision in DFEH v. Terra Linda Farms
(Santillian/Rivas) precedential. Commissioner Carothers dissented.
- 08-33 Voted 5:0 to adopt the proposed decision in DFEH v. Jennifer Victoria
(Project Sentinel).
- 08-34 Voted 5:0 to end Closed Session and entered Open Session.
- 08-35 Voted 5:0 to adjourn the meeting.

Prepared By

Loc D. Tra
Clerk of the Commission